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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2011-145256-001 DT 05/02/2016

HONORABLE DAWN M. BERGIN

CLERK OF THE COURT
K. Sotello-Stevenson
Deputy

STATE OF ARIZONA

DAVID R COLE

v.

ANTHONY EDWARD RAIMONDE (001)

ANTHONY EDWARD RAIMONDE
#280684 ASPC YUMA/CIBOLA
P O BOX 8820
SAN LUIS AZ 85349

COURT ADMIN-CRIMINAL-PCR
OFFICE OF PUBLIC DEFENSE
SERVICES-CCC

**PETITION FOR POST-CONVICTION RELIEF DISMISSED**

The Court has reviewed Defendant's Petition for Post-Conviction Relief filed on December 2, 2016; the State's Response; and Defendant's Reply. It now makes the following findings and orders.

On February 11, 2013, a jury returned verdicts of guilty against Defendant on one count of Second Degree Murder, a class 1 dangerous felony, and one count of Misconduct Involving Weapons, a class 4 dangerous felony.[1] The Court found that Defendant had two prior historical class 6 felonies based on his testimony at trial. On May 3, 2013, the Court sentenced the Defendant to 19 years for second degree murder and 8 years on misconduct involving weapons, with the sentences to run concurrently. Defendant appealed his conviction, but it was affirmed by the Court of Appeals in a memorandum decision filed December 23, 2014.

[1] Dangerousness for the misconduct involving weapons charge was found by the jury.

**Factual Background**

On the night of August 27, 2011, the victim, C.C., picked up his friend, Adrian Robles, and headed to a bar to watch a sporting event. Robles brought a loaded handgun and stored it under the front passenger seat of C.C.'s car. While they were out, Robles and C.C. ran into Defendant, who was also a friend. The three of them went to other bars, and were thrown out of one when C.C. and Defendant got into an argument. C.C. and Defendant got into another argument while C.C. was driving Robles and Defendant home. When C.C. stopped at a convenience store, the argument escalated, and Defendant ultimately grabbed Robles' gun from under the front passenger seat and shot C.C., killing him. He then fled the scene.

**Legal Analysis**

Defendant contends that he is entitled to post-conviction relief because the Court: (1) erred in instructing the jury; (2) erred in limiting the scope of testimony of his expert witness; and (3) violated his speedy trial rights. He also claims that he received ineffective assistance of counsel.

**A. Ineffective Assistance of Counsel**

Defendant argues that his attorney was ineffective because he failed to object to: (1) the original indictment as lacking sufficient specificity; (2) the State's amendment to the indictment; and (3) "the use of class 6 felonies to enhance the term of a class: dangerous sentence."

To prevail on a claim for ineffective assistance of counsel, a Defendant must show that: (1) trial counsel's performance was deficient; and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome of the case would have been different. Strickland v. Washington, 466 U. S. 668, 687 (1984); *State v. Rosario*, 195 Ariz. 264, 987 P.2d 266 (App 1999).

All of Defendant's claims for ineffective assistance of counsel fail because any objection by his attorney to the original indictment, the amendment to the indictment or the sentencing enhancement would have been futile.

1. The Indictment and Amended Indictment

Defendant claims that the original indictment was defective because it alleged that the crimes occurred "*on or about* the 28th day of August, 2011 (emphasis added)." Under Arizona law, a criminal indictment must "fairly indicate[ ] the crime charged; state[ ] the essential

elements of the alleged crime; and [be] sufficiently definite to apprise the defendant so that he can prepare his defense to the charge." *State v. Marquez*, 127 Ariz. 98, 101, 618 P.2d 592, 595 (1980) (quoted citation omitted). Similarly Rule 13.2 of the Arizona Rules of Criminal Procedure requires that an "indictment or information shall be a plain, concise statement of the facts sufficiently definite to inform the defendant of the offense charged."

The evidence showed that Defendant, C.C. and Robles went out the night of August 27, 2011, and Defendant shot C.C. in the early morning hours of August 28. Defendant cannot seriously contend that the use of "on or about" made the indictment too vague "to apprise [him] so that he [could] prepare his defense to the charge." *Id.* This is particularly true since the shooting actually occurred on August 28, 2011.

As to amending the indictment to include the State's Allegation of Historical Priors, Allegation of Aggravating Circumstances and Allegation of Offenses Committed While on Release, Rule 13.5(a) of the Arizona Rules of Criminal Procedure allows the State to "add an allegation of one or more prior convictions or other non-capital sentencing allegations that must be found by a jury within the time limits of Rule 16.1(b)." Each of the State's filings was submitted within the time limits prescribed by 16.1(b) (*i.e.*, 20 days before trial), and were therefore permissible.

As Defendant has no legitimate argument that the original indictment was defective or that the amendment was legally impermissible, he has no claim for ineffective assistance of counsel on this basis.

2. Sentence Enhancement

Defendant's counsel had no basis to object to the Court's use of his prior felony convictions to enhance his sentence. That Defendant would make this argument demonstrates a misapprehension of the law. First, Defendant was convicted of second degree murder, which, at the time, carried a sentencing range of 10 years minimum to 22 years maximum, with a presumptive term of 16 years. The jury found one aggravator--that the offense caused physical, emotional or financial harm to the Victim's immediate family.

The Court found that Defendant had two prior historical class 6 felony convictions based on his admissions at trial. *See State v. Cons*, 208 Ariz. 409, 94 P.3d 609 (App. 2004); A.R.S. §13-701(D). The existence of those felonies did not enhance the sentencing range for the second degree murder charge (*i.e.*, the range of 10 to 22 years remained the same). However, pursuant to A.R.S. §13-701(D), the Court needed only one aggravator to impose a sentence higher than the presumptive term of 16 years. As noted, the jury unanimously found the aggravator of harm to the victim's family. The Court was also permitted to use a prior felony

conviction within the last 10 years as an aggravator. A.R.S. §13-701(D)(11). Thus, the Court's imposition of a 19-year sentence was lawful.

B. **Jury Instructions**

Defendant argues here, just as he did on appeal, that the Court erred in instructing the jury. Rule 32.2(a)(2) precludes a defendant from seeking post-conviction relief on claims that were fully and finally adjudicated on appeal. The Court of Appeals did just that on Defendant's claims that the Court erred in instructing the jury:

> The court did not err, much less fundamentally err to Raimonde's prejudice, but instructing the jury as it did. The instructions in this case adequately informed the jury of the governing law, and the court did not fundamentally err in giving them.

(Mem. Decision at 8).

**C. Limitation on Scope of Expert Testimony**

Defendant also claims that the Court erred in limiting the testimony of his "self-defense expert," Dr. Streed. Rule 32.2(a)(3) of the Arizona Rules of Criminal Procedure precludes post-conviction relief on any ground that a defendant could have asserted on appeal. Because the Court's limitation on Defendant's expert's testimony is such a claim, it is barred here.[2]

The Court also notes that Defendant fails to present any legal argument to support either that the limitation of the evidence constituted error or that admission of the excluded testimony would have changed the jury's verdict.

**D. Speedy Trial Rights**

Defendant's argument that his speedy trial rights were violated is another claim that Defendant could have asserted on appeal. Furthermore, each time the Court continued the trial beyond the last day, Defendant waived time. This claim is therefore barred by Rule 32.2(a)(3).

If Defendant is also trying to cast this claim a one for ineffective assistance of counsel—*i.e.*, that his lawyer failed to properly object to trial continuances—the attempt

[2] Defendant cannot recast this claim as one for ineffective assistance of counsel since his attorney sought admission of the testimony excluded by the Court.

fails. A trial court is granted wide discretion in granting continuances. Further, "[p]rejudice sufficient to support a claim of denial of the Sixth Amendment right to a speedy trial requires a specific showing of how the passage of time has impaired the defendant's ability to prepare his defense." *United States v. Paul*, 326 F. Supp. 2d 382, 387 (E.D.N.Y. 2004). Defendant has made no showing of prejudice from the delay.

**E. The "Catchall" Errors**

At page eight of his Petition, Defendant states that the "comprehensive list" of court errors "precludes presentation of all." He identifies a "fairly representative cross-section" by minute entry. Those instances include the Court allowing the deposition of Adrian Robles, precluding Dr. Streed from testifying that Defendant's actions were reasonable or consistent with self-defense (addressed above); and precluding Defendant from inquiring into testimony by a state witness regarding an alleged statement by Robles while at one of the bars he visited. Again, these are all issues that could have been raised on appeal. They are therefore barred by Rule 32.2(a)(3). Further, Defendant provides no legal argument to support his claim that the Court committed error in making these rulings or that different rulings would likely have resulted in a different outcome.

For these reasons,

**IT IS ORDERED** dismissing Defendant's Petition for Post-Conviction Relief.